No. 78-349

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA,
Petitioner,

vs.

HENRY HELSTOSKI.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The respondent, Henry Helstoski, herewith submits his opposition to the government's petition for a writ of certiorari herein.

Preliminary Statement

Heretofore, under date of September 29, 1978, respondent herein filed his petition for a writ of certiorari, No. 78-546. The said petition presented for review the action of the Court of Appeals in denying a petition for mandamus/prohibition seeking to prevent trial upon an indictment which on its face charged a Member of Congress with the performance of a legislative act. The government's petition in the instant case is from a ruling of the Court of Appeals sustaining pretrial evidentiary rulings by the District Court, which were brought up on interlocutory appeal under 18 U.S.C., §3731.

The issues in the two petitions are quite different but they are related. Accordingly, respondent respectfully suggests that the Court may wish to consider together the government's petition in the within case and the respondent's petition in No. 78-546.

Counter-Statement of the Case

The Court is respectfully referred to respondent's Statement, as it appears in his petition in No. 78-546 for his Counter-Statement of the Case. Additionally, respondent notes that the statement submitted by the government omits two vital matters which raise the most serious questions as to the appropriateness of this case for reveiw upon a writ of certiorari.

1. Much of the thrust of the government's petition is based not upon any record but rather on an assumption of what the testimony of certain witnesses might be. The defendant in this case has not only staunchly denied the allegations of the indictment; he has denied that the witnesses will testify as the government says they will. While the government has filed with the Court as part of a special appendix its proffered proofs, it failed to file with the Court an opposing affidavit which challenged the assertions of the government as to what the witnesses would say.

Accordingly, with the filing of this response to the government's petition, defendant has filed, under seal, his own special appendix, which consists of an affidavit which was filed in the District Court at the time the government filed is proffered proofs in that court. This affidavit shows that there was a sharp issue not only as to the facts but, more importantly, as to whether the government witnesses would testify as the government said they would. Thus, the supposititious nature of much of the

government's case becomes much clearer.

Not mentioned in the government's statement of the proceedings in the lower court is the fact that respondent moved to dismiss the government's appeal to the Third Circuit on the contention that the same was not covered by 18 U.S.C., §3731, a motion denied by the Third Circuit (Pet., 22a-25a). While respondent has not cross-petitioned with respect to that issue, it is nevertheless clear that by its petition the government seeks to have this Court adjudicate claimed fundamental issues with respect to the relationship between the legislative and judicial branches of our government upon a record which as to some of its basic factual underpinnings is conjectural and hypothetical.

2. The second factor omitted from the government's statement relates to its waiver argument in so far as concerns appearances before the grand jury. The government omits to mention that while material of a legislative nature was elicited from then Congressman Helstoski when he appeared before the grand jury, he had every reason at the time to believe that it was his erstwhile aide whom the government was pursuing. Since the Speech or Debate Clause does not provide any legislative immunity from testifying when third party crimes are involved (Gravel v. United States, 408 U.S. 606, 628-29 (1972)), this omission of course relates to a critical factor in evaluation of the impact, if any, of the respondent's appearances before the grand jury.

At no time during all the grand jury proceedings was respondent ever notified that he was a target. 1/

1/ As explained by Judge Meanor in his opinion of February 24, 1977 (printed at 9a of petitioner's appendix in No. 78-546), there was no question that the government was investigating the "'purchase' [of] private immigration bills from a 'connection' with the House of Representatives" (id. at 20a). But

[Footnote continued on p. 4.]

Indeed, when on May 7, 1976, he inquired whether he was, he was informed that his question was "inappropriate" (Tr., grand jury proceedings, 5/7/77, p. 13, C.A. App. 1501).[2] Respondent did not submit to the grand jury any material by way of bills or correspondence relating to bills after his request to know if he was targetted was denied an answer.

Reasons Why the Petition Should be Denied

I.

THE EFFORT TO AVOID THE HOLDINGS OF JOHNSON AND BREWSTER.

The government's petition is frankly an effort to avoid the holdings of this Court in United States v. Johnson, 383 U.S. 169 (1966), and United States v. Brewster, 408 U.S. 501 (1972). The government admits that statements in those opinions "look in the direction of the result reached by the Court of Appeals" (Pet., p. 14). It nevertheless develops an extended argument which, if it were adopted, would literally render the Speech or Debate Clause quite meaningless.

The nub of the government's argument is that, despite Brewster and Johnson, it should be permitted in a prosecution of a legislator to prove legislative acts, if -

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[Footnote 1 continued from previous page:]
the suggestion that it was Helstoski, rather than his aide, who was the "connection" was never advanced to Helstoski.

2/ "C.A. App." designates a five-volume appendix filed by the government in the Court of Appeals.

1) It proves the legislative acts by evidence of "acts and conversations ... [which] occurred outside of the congressional sphere and were not part of the due functioning of the legislative process; thus there is no question here, as there was in Johnson, of direct proof of a legislative act privileged under the Clause" (Pet., p. 15).

We understand this to mean that the government believes it can prove legislative acts provided it does so indirectly rather than directly, i.e., instead of having the Clerk of the House testify or offering the Congressional Record to establish that a Member of Congress introduced a bill or made a speech, it will seek to prove those same facts by a letter written by the Member or a campaign speech or a private conversation in which he describes his legislative activities.

2) "[T]he evidence is sought to be introduced for the legitimate purpose of proving respondent's state of mind and guilty knowledge in accepting money, and any references to the occurrence of past legislative acts are incidental" (ibid.)

We understand this argument to mean that the government may prove legislative acts to its heart's content if it but attribute to its evidence a purpose other than proof of such acts.

3) "[P]roof of the conversations and other occurrences would not 'draw into question' or 'impugn' any legislative act or 'inquire into' respondent's motives therefor" (ibid.).

We are unable to paraphrase what this argument means since frankly we do not understand it and nowhere does the government explain it. We believe the government has simply set forth its conclusion and refers to it as if it were a fact.

These contentions reveal a failure to comprehend the nature of the Speech or Debate Clause, its role in maintaining the independence of the legislature, and the tripartite structure of our government.

This view of the Speech or Debate Clause is at the heart of the Brewster and Johnson decisions, and see also, Kilbourn v. Thompson, 103 U.S. 186 (1881), and Tenney v. Brandhove, 341 U.S. 367 (1951).

1. The Speech or Debate Clause is no evidentiary loophole or legislator's perquisite. It is the bedrock upon which our system of government is built. The independence of the legislature, first established in the English Bill of Rights of 1689, was embodied into our own Constitution and became part of an even broader design of a tripartite Separation of Powers. The Speech or Debate Clause was the wall which the English Parliament and then the Framers of our own Constitution built to protect the body closest to the people's will from the executive branch. As Thomas Jefferson explained it,

> "In order to give to the will of the people the ... influence it ought to have, ... it was ... adopted as the law of this land, that their representatives, in the discharge of their function, should be free from the ... coercion of the co-ordinating branches..." 8 Works of Thomas Jefferson 322.

2. Members of Congress, however, are not left free to behave as they wish, to break the law, or to act corruptly, for Congress itself is given the authority, denied the executive and the judiciary, to scrutinize and, if need be, to punish the acts of its Members:

> "The Constitution expressly empowers each House to punish its own members for disorderly behavior. We see no reason to doubt that this punishment may in a proper case be imprisonment..." Kilbourn, supra, at 189-90.

Such action, however, is left to the judgment of the legislature and may not be compelled by any extrinsic power. Thus, the chance that a wrongdoer may escape justice, if justice rests only upon the judgment of his peers, was a risk the Framers consciously chose, Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), as against the virtual certainty of executive depredations upon the functional independence of Congress which unrestricted prosecutorial discretion would create.

Thus, the Speech or Debate Clause functions to allocate jurisdiction. It is the Congress which has the power to prosecute for improper legislative conduct; such conduct is beyond the purview of the executive branch of the government.

3. Since ours is a government of laws, not men, the immunity created by the Speech or Debate Clause does not protect Members of Congress, as such; they are protected only to the extent they function in the legislative sphere. As this Court said:

> "The business of Congress is to legislate; Congressmen ... are absolutely immune when they are legislating. But when they act outside the 'sphere of legitimate legislative activity' [citation omitted], they enjoy no special immunity..." Doe v. McMillan, 412 U.S. 306, 324 (1973).

How, then, does the Speech or Debate Clause operate when a legislator is charged with a non-legislative act, e.g., bank fraud, and when an effort is made to introduce at the trial proof of a legislative act as some supporting evidence thereof?

Brewster and Johnson deal directly with that issue. They make clear that the Clause confers immunity upon acts, not actors. The Court in Johnson read the Speech or Debate Clause to hold that even in such a situation - when the charge was of a

non-legislative act - the government could not introduce any evidence of a legislative act. Such a holding was in accord with the historical function of legislative immunity which served to protect legislators from having their legislative acts questioned, no matter what the charge lodged against them. Johnson simply makes explicit what the Speech or Debate Clause implies: If a Member of Congress be prosecuted for non-legislative conduct, the proceeding must in the details of proof remain untainted by any incursion into "protected acts that cannot be shown in evidence," Brewster, supra, at 528.

Brewster reiterated the Johnson analysis, applying it to a charge of a corrupt agreement to procure a legislative act. Since "taking a bribe ... is not a legislative act," at 526, he could be prosecuted therefor provided that the government was "preclude[d] [from] any showing of how he acted, voted, or decided," at 527.

4. This evidentiary consequence of the Speech or Debate Clause in cases where prosecution is had for non-legislative acts is in truth the only way that the Speech or Debate Clause can have any meaning. There was a time in English history when Members of Parliament were indeed prosecuted directly for their votes and speeches in opposition to the executive. But that type of executive assault upon a legislator has long since ceased to be the method of attack upon a legislator. Even before 1689, the pursuit of a legislator has always involved charging him with a plainly non-legislative act, e.g., taking a bribe, committing treason, releasing security information. The independence of the legislative body becomes compromised, however, when legislative acts are sought to be introduced in support of such a prosecution.

Mr. Justice Harlan dealt directly with this issue in his learned opinion in Johnson when he pointed out that "[a]lthough historically seditious

libel was the most frequent instrument for intimidating legislators, this has not been the sole form of legal proceedings so employed and the language of the Constitution is framed in the broadest terms," 383 U.S. at 182-83.

5. The Framers of the English Bill of Rights, as well as of our own Constitution, thoroughly understood the evidentiary implications of the Speech or Debate Clause, for both the British and the American Clauses not only forbid prosecution for a legislative act as such but, more broadly, speak of a prohibition against "questioning" a legislator for his speech or debate. Thus, the evidentiary limitations so carefully delineated by this Court in Johnson and Brewster are the key to the implementation of the Speech or Debate Clause.

6. Nor is there any doubt as to the content of those limitations, for this Court in Johnson permitted retrial of a charge only "with all references to [defendant's legislative act - a speech on the floor] eliminated." The retrial could proceed provided it was "wholly purged of elements offensive to the Speech or Debate Clause," 383 U.S. at 185. And in Brewster, the Court, reaffirming that holding, said: "[O]ur holding in Johnson precludes any showing of how he acted, voted, or decided," 408 U.S. at 527. And again, "[p]erhaps the government would make a more appealing case if it could do so, but here, as in that case [Johnson], evidence of acts protected by the [Speech or Debate] Clause is inadmissible." 408 U.S. at 528.

7. In the teeth of the plain historical purpose of the Speech or Debate Clause and the clear holdings of this Court, the government presses for the right to prove legislative acts - provided it resorts to what it considers to be indirect rather than direct methods of proof. Thus, if it could prove that a Member of Congress performed a legislative act, e.g., introducing a bill, by introducing a letter of

his in which he said so to a constituent, then, so its argument goes, it would not be offending the Speech or Debate Clause because it would not have called the Clerk of the House to prove that fact by direct evidence nor would it have introduced the Congressional Record.

But the Speech or Debate Clause prohibits proof of legislative acts; it does not distinguish between methods of proof. Since the design and purpose of the Clause is to avoid executive and judicial threats to the independence of the legislature - to permit the legislature to do its own policing of allegations of improper conduct of legislators - plainly it could hardly matter how a legislative act is established.

8. Equally tenuous is the other argument of the government, namely, that if it designates its proof of a legislative act as being intended to establish a state of mind while engaging in a non-legislative act, it may prove the legislative act. Since, as we have pointed out, legislators are never prosecuted directly for their legislative acts but always for their non-legislative acts, the effect of this argument is to open proofs to legislative acts in any prosecution of a legislator.

9. The government also contends that it should be permitted to prove legislative acts by any private conversations or correspondence, on the theory that since those acts are not part of the legislative process itself, they ought to be established under the cases of Gravel v. United States, 408 U.S. 606 (1972), and Doe v. McMillan, 412 U.S. 306 (1973). Of course, those cases merely hold that a legislator is liable for what he does outside the halls of Congress. He could be prosecuted for publishing outside the halls of Congress government documents not publishable (Gravel); he could be sued for libel if he publishes defamatory material outside the halls of Congress (Doe). But in each case, neither the prosecution nor the proofs would involve proof of what actually

happened in the legislative body.

Here the whole point of the conversations or letters sought to be introduced is that they would establish that the legislative acts were performed. The truth of the matter is that in this case the government's case is so thin, so uncorroborated, so lacking in objective proof, and so utterly dependent on the unsupported testimony of two persons who are demonstrably untrustworthy, that it wishes to give its case the aura of plausability by massive correspondence showing that the defendant engaged in legislative activity. The trial would, on the government's scenario, become a review before a jury to what transpired on the floor of the House - exactly what the Speech or Debate Clause was designed to prevent.

The government does not dissemble; it makes it perfectly clear that it wishes a ruling that, despite Brewster and Johnson, it may in any prosecution of a Member of Congress or a Senator prove legislative acts, provided it does so a) by some indirect means, and b) it states the object of its proof as being to establish purpose or intent. We ask one simple question: What would the government's argument leave of the Clause once described by Mr. Justice Story as being that "great and vital privilege without which all other privileges would be comparatively unimportant or ineffective," I Story On the Constitution, §866, p. 600? Mr. Justice Harlan in his opinion in Johnson dealt with similar contentions of the government which were designed to limit the Speech or Debate Clause in such manner as to render it all but meaningless. But this Court, being of the view that "the legislative privilege will be read broadly to effectuate its purposes," Johnson, 383 U.S. at 180, rejected that effort. The evidentiary proscriptions delineated by Johnson and Brewster were designed to strike a reasonable balance between the Speech or Debate Clause and the proper functioning of our criminal justice system. The effort of the government in this case to undercut such

proscriptions should be dismissed out of hand.

II.

THE WAIVER ISSUE.

As we pointed out above, in the Statement of the Case, the government has omitted any reference to the fact most critical to a consideration of the waiver issue as applied to grand jury testimony, namely, that the defendant had every reason to believe that he was not the target and that, accordingly, he was required to testify. It seems quite clear that the Speech or Debate Clause does not permit a legislator to refuse to testify about legislative acts when a third party crime is investigated. 3/ Thus, there is no foundation whatever for the government's statement that Helstoski furnished documents "with knowledge that he could withhold them and assert his privilege under the Speech or Debate Clause," (Pet., p. 21). And the reference is merely to a portion of the opinion which makes clear that Helstoski knew of the existence of the Speech or Debate Clause. The government ignores the statement in that same opinion that there is no Speech or Debate immunity where third party crimes are being investigated (Pet., 57a).

To argue from those facts that there was a waiver of a great constitutional principle seems absurd. Since there is no point at which Helstoski

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3/ See Gravel v. United States, 408 U.S. 606, 628-29 (1972), and opinion of Mr. Justice Stewart, dissenting in part, id. at 630. This view of the operation of the Speech or Debate Clause in circumstances where a third party crime is being investigated was pressed on this Court by the government. See brief for the United States in Gravel v. United States, U.S. Supreme Court, Nos. 71-017 and 71-1026, p. 13.

was told he was a target of investigation, there is obviously no point at which he could be said to have waived, either expressly or voluntarily, those rights which a targetted Member of Congress has.

The truth is that it seems very doubtful that the Speech or Debate Clause is under any circumstances waivable by an individual member of the legislature. Thus, in his Manual of Parliamentary Practice, prepared only four years after the adoption of the Constitution and adopted by the House in 1937, Jefferson said:

> "The privilege of a Member is the privilege of the House. If the Member waive it without leave, it is a ground for punishing him, but cannot in effect waive the privilege of the House." Manual, §301, p. 130.

In any event, this is hardly an appropriate case to consider the issue of waiver for several distinct reasons:

a) Neither the District Court nor the Court of Appeals ruled on the underlying question, i.e., whether the Speech or Debate Clause is waivable by an individual Member. The suggestion of waivability is based exclusively on a holding by a panel of the Seventh Circuit in United States v. Craig, 528 F. 2d 773 (1976), which decision was vacated by the Circuit Court sitting en banc, 537 F. 2d 957. Even the panel decision dealt with a State, not the Federal, Speech or Debate Clause. Since neither the District Court nor the Court of Appeals in this case passed on the question, any consideration of that issue would be without the benefit of prior judicial consideration.

b) Beyond that, the issue of waiver seems to boil down to the government's pressing for a rule of waiver by voluntary act. The Third Circuit, however, quite properly views the Speech or Debate Clause not as a privilege of non-disclosure of confidentiality (Pet., 31a), but rather a part of the basic structure

of government designed "to protect the integrity of the legislative process [and insure] the independence of individual legislators," Brewster, 408 U.S. at 507. Under those circumstances, it came to the conclusion that:

> "Out of deference, then, to a co-equal branch of government, we hold that even if an individual member may waive his Speech or Debate privilege - a question we do not decide - any waiver in the context of a criminal prosecution must be express and for the specific purpose for which the evidence of legislative acts is sought to be used against the member." (Pet., 32a.)

The utter inappropriateness of the government's waiver argument is revealed by a logical extension of its position argued below but not mentioned to this Court. In the lower court, the government argued that waiver was effected not only by testimony before the grand jury but also by disclosure to constituents by correspondence and oral statements that he had performed legislative acts. If the test is indeed mere voluntariness of disclosure, such an extension of the argument is reasonable.

But, as the court below observed, a legislative body in our society is a very public institution which has as one of its important functions informing the public about its activities. Legislators do not keep their legislative activities confidential; they speak about them as much as they can, and indeed they should. This point was emphasized by the District Court in rejecting the government's argument(Pet., 56a). Yet if the grand jury testimony is taken as constituting a waiver because the testimony was voluntarily given, there is no basis for denying that a waiver may follow from other voluntary statements.

It is difficult to see that the argument that waiver of the Speech or Debate Clause occurs by

by voluntary disclosure of legislative acts presents a serious issue.

CONCLUSION

Ultimately, the government's argument is that the Speech or Debate Clause is a mere evidentiary loophole - a legislator's stratagem - an obstructive vestige of ancient times, to be interpreted into nothingness. This Court has time and time again rejected that view and has insisted upon the centrality of the Speech or Debate Clause in the workings of our tripartite system of government.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 1978.